

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK R. HILT

Claimant

VS.

CITY OF TOPEKA

Self-Insured Respondent

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Docket No. 1,010,390

ORDER

Respondent requested review of the March 14, 2005, Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on September 7, 2005.

APPEARANCES

Bruce Alan Brumley, of Topeka, Kansas appeared for the claimant. Jeff K. Cooper, of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant qualified under the AMA *Guides*¹ for a diagnosis related estimate (DRE) lumbosacral spine impairment Category V 25 percent permanent partial general bodily impairment. The ALJ found the opinions of Dr. Theodore Sandow, Jr., and Dr. Travis Oller, that claimant has a loss of motion segment integrity, were more persuasive than those of Dr. Sergio Delgado and Dr. Phillip Baker, who opined that claimant does not have a loss of motion segment integrity.

¹American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

The respondent requests review of the nature and extent of claimant's impairment. Specifically, respondent contends claimant should be limited to a 10 percent permanent partial bodily disability based on the ratings of Dr. Delgado and Dr. Baker. In the alternative, respondent requests the Board modify the ALJ's 25 percent permanent partial general bodily disability award to 17.5 percent, giving equal weight to Dr. Delgado's and Dr. Baker's 10 percent ratings and Dr. Sandow's and Dr. Oller's 25 percent ratings.

Claimant contends the ALJ correctly awarded claimant a 25 percent permanent partial general bodily disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is a bicycle patrolman for the Topeka Police Department and had a work-related accident on June 9, 2001, when he was riding his bicycle downhill and crashed into his partner. The respondent has stipulated to the facts of the accident and that it was work-related.

Dr. Baker is board certified in orthopedic surgery and disability medicine and saw claimant on December 5, 2002, at the request of respondent. Claimant gave a history of being in a bicycle accident resulting in injury in June 2001 and stated he had undergone surgery for a right L5-S1 partial laminectomy and excision of a large disk fragment in July 2001. That surgery was performed by Dr. Craig Yorke, a neurosurgeon. At the time of Dr. Baker's examination, claimant was back to work as a bicycle patrolman for respondent and was still complaining of discomfort or achiness in his back and some discomfort and numbness in his left leg and foot. Dr. Baker obtained lumbosacral range of motion x-rays of claimant at the time of the examination. These included x-rays that were taken with claimant in flexion and extension of the spine. Lateral spine x-rays were also taken. After reviewing the x-rays, Dr. Baker found no angular loss of motion segment integrity, no motion segment instability and no slippage between the vertebrae.

Dr. Baker also reviewed x-rays from Dr. Oller and testified that in looking at those x-rays, he likewise saw no motion segment instability.

On cross-examination, Dr. Baker testified that loss of motion can be shown on flexion, extension or lateral x-rays, but it is easiest to show on lateral x-rays. However, he lined up the flexion and extension x-rays his office took of claimant using L5 as a point of reference, and by eyeballing the lines, not taking any measurements, determined that it was less than five millimeters.

Dr. Baker testified that claimant suffered a herniated disk, and under the DRE of the *AMA Guides*, claimant had a permanent general bodily impairment of 10 percent.

Dr. Theodore Sandow, Jr., a board certified orthopedic surgeon, examined claimant at the request of claimant's attorney on June 2, 2003, and again on February 16, 2004. At the time of Dr. Sandow's first examination of claimant, claimant was post-operative. Claimant told Dr. Sandow that the pain in his back, right buttocks and legs was gone but that numbness persisted. After claimant returned to work, he noticed spasms in his left calf. Claimant told Dr. Sandow that in the past two months, his left buttock and leg pain had worsened, his low back pain and radiation into the left buttock and leg was constant, and he had begun to experience recurrent right buttock pain. Dr. Sandow's diagnosis was post-operative herniated nucleus pulposus, L5-S1 right, with significant neuromuscular residual in the right lower extremity; rule out herniated nucleus pulposus, L5-S1 left.

When Dr. Sandow next saw claimant on February 16, 2004, claimant related to Dr. Sandow that the pain on his left side was significantly less. After reviewing medical records and examining claimant, Dr. Sandow's diagnosis was the same as before except as related to claimant's left side. Dr. Sandow indicated claimant had reached maximum medical improvement and, using the *AMA Guides*, stated claimant most closely fit into the DRE Thoracolumbar Category IV and rated claimant as having a 20 percent whole person impairment.

But at his deposition, Dr. Sandow testified that after he reviewed x-rays taken by Dr. Oller before the deposition, his opinion changed and he now believed claimant should be in Category V because of the segment motion abnormalities noted on the x-rays. According to Dr. Sandow, the percentage of impairment for a DRE Category V is 25 percent.

On November 11, 2004, a second deposition of Dr. Sandow was taken after he had a chance to review x-rays taken by Dr. Baker's office. Dr. Sandow testified the films appeared to show retrolisthesis of L5 on the sacrum of approximately five millimeters. Dr. Sandow also reviewed x-rays taken at St. Francis Hospital for Dr. Delgado. Dr. Sandow stated those films were not very good quality, and he suspected they were taken by an inexperienced technician. He still believed the x-rays established a Category V impairment. He also said that the distance someone bends would affect the measurements on loss of motion. In testifying about the x-rays taken at St. Francis for Dr. Delgado, claimant stated he was not bent when x-rays were taken frontwards, but he did bend slightly when they were shooting from the side, whereas, when claimant was x-rayed by Dr. Oller and for Dr. Baker, he was instructed to bend as far as he could go.

Travis Oller, D.C., has been a chiropractor for three and one-half years. He testified that he was familiar with the *AMA Guides* and has prepared ratings using them. Dr. Oller saw claimant at the request of claimant's attorney on April 16, 2004. In conjunction with his examination of claimant, Dr. Oller reviewed medical records and took x-rays. Dr. Oller

acknowledged that this case was the first time he had been asked to give an opinion with regard of loss of motion segment integrity.

Dr. Oller testified that under the DRE model in the *AMA Guides*, there are eight categories for lumbar spine impairment, and for Categories III and higher, radiographic evidence can be used to determine loss of motion segment integrity. Dr. Oller used standard radiographic procedures to take the lumbar spine films. As far as positioning a patient for x-rays to determine loss of motion, Dr. Oller would start out with a plain lateral x-ray, in which the patient would stand straight up and down. From that standing position, he would then take a flexion x-ray, where the patient would bend forward as far as he could; and then he would take an extension x-ray, where the patient would bend back as far as he could. This is what he did with claimant.

Dr. Oller testified that through the use of the *AMA Guides*, there are two ways to determine loss of motion segment integrity, by using Figure 62 and Figure 63. Using Figure 62, Dr. Oller determined that claimant had posterior translation on the x-rays greater than 5 milligrams. Dr. Oller also looked at Figure 63, which is the angular motion, and according to that, there was no loss of motion segment integrity for angular motion. In his deposition, Dr. Oller explained his x-rays show claimant's posterior translation of L5 on S1 is with extension. Using the *AMA Guides*, Dr. Oller opined that claimant had a 20 percent whole person impairment for loss of lumbar motion segment integrity.

Dr. Oller testified that he did not see any need to place any restrictions on claimant, even though claimant's job as a bicycle police officer was a very physical type of employment. At the time he examined claimant, claimant was not taking any medication for pain.

At a second deposition taken November 5, 2004, Dr. Oller testified he had reviewed the x-rays of Dr. Baker and Dr. Delgado because of a discrepancy in the measurement on the x-rays related to the *AMA Guides*, specifically Figures 62 and 63. In reviewing the x-rays from Dr. Baker, Dr. Oller determined there was a nine millimeter posterior translation of L5 on S1 based on Figure 62, page 98 of the *AMA Guides*. In looking at the x-rays taken from Dr. Delgado, Dr. Oller determined there was a six millimeter translation.

Dr. Oller agreed that claimant suffered from radiculopathy, which put him in a Category III impairment. Dr. Oller also agreed that a patient having the radiculopathy required for a Category III impairment and loss of motion segment integrity required for a Category IV impairment would be bumped up to a Category V impairment with a 25 percent impairment.

Dr. Sergio Delgado, a board certified orthopedic physician, met with claimant at the request of respondent on October 26, 2004. Dr. Delgado took a history from claimant and performed an examination of claimant, including having x-rays taken through St. Francis Hospital. Dr. Delgado obtained dynamic films, which he described as special radiographic

studies from which measurements are taken to determine instability of the spine. He said the quality of those films was adequate for the purpose of the measurements performed in order to determine if there was instability. When asked about claimant's testimony that he did not bend as far as when other x-rays were taken, Dr. Delgado stated: "[E]ven with minimal flexion, the radiographic measurements do not suggest that any further flexion would have compromised the results of the measurements."² Dr. Delgado stated that he determined that claimant had no loss of spinal motion segment integrity. Dr. Delgado based his opinion on (1) claimant did not have any congenital abnormality of the spine; (2) claimant had minimum complaints related to the low back as far as pain, and somebody with instability would have significant pain and limitation of activities; and (3) the measurements did not prove instability. Dr. Delgado stated the pain would be in the back, not in the legs. Dr. Delgado determined, using the *AMA Guides*, that claimant had a 10 percent whole person impairment.

Dr. Delgado had reviewed one x-ray from Dr. Baker. Dr. Delgado testified that he could not determine from that one x-ray whether claimant had loss of motion segment integrity, but he would need the flexion, extension and neutral x-rays to make such a determination. Dr. Delgado testified that if Dr. Baker expressed his opinion by eyeballing only one x-ray film, that would not be an appropriate method for determining loss of motion segment integrity. In reviewing Dr. Oller's x-rays, Dr. Delgado testified he did not feel comfortable making a determination of instability from those x-rays because he believed the lines drawn on the x-rays were not appropriate.

Dr. Delgado stated that translation is the position of the vertebra on top of each other. In flexion and extension studies, anything over a five millimeter shift is considered a sign of instability. Measurements Dr. Delgado made showed a one millimeter discrepancy in translation. Dr. Delgado used the vertebral surfaces for the L4-L5 and L5-S1 measurements for both translation and for angular motion. Dr. Delgado testified that Figure 62 of the *AMA Guides* shows translation; Figure 63, showing angular motion, is inapplicable in this case. Dr. Delgado testified that claimant does not have any translation or angular motion instability. The instability occurs when you bend or stand. It is the difference between the two that is measured. The remedy for instability is fusion; short of fusion, patients usually have debilitating pain.

The Board considers all of the expert opinions rendered in this case to be credible, and they all should be given some weight. But, in this instance, the opinions of Dr. Sandow and Dr. Oller are most persuasive. Dr. Sandow reviewed all of the x-ray films and used appropriate methodology to reach his conclusions. The Board agrees with the ALJ's finding that claimant is entitled to a 25 percent permanent partial general disability award.

AWARD

²Delgado Depo. at 8.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated March 14, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Jeff K. Cooper, Attorney for Self-Insured Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director